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# NEW FAIR LABOR STANDARDS ACT OVERTIME REGULATIONS EFFECTIVE AUGUST 23, 2004

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The final new Fair Labor Standards Act (FLSA) regulations governing overtime pay exemptions for executive, administrative, professional and computer employees will become effective on August 23, 2004.[1] State and local government employers must now review the FLSA classification of each position in their workforce.

A draft set of new regulations was published in March 2003.[2] In accordance with federal administrative procedures, the Department of Labor accepted written comments on the proposed regulations for ninety days. The March 2003 proposed regulations made significant changes to the law and generated both political controversy and extraordinary public comment. The final regulations are considerably less drastic a revision of the law governing exemptions from overtime.

The Department of Labor has summarized the most important critiques of the rules as originally proposed and its responses to those critiques in a section entitled "Summary of Major Comments" in the preamble that precedes publication of the actual regulations in the Federal Register (hereinafter, the "Preamble Discussion").[3] Although the Preamble Discussion is not legally binding, it provides useful insights into the Department of Labor's interpretation of the new regulations.

This Public Employment Law Bulletin looks at how the final regulations are likely to affect state and local government employers in North Carolina. Some of the most important changes include:

- A significant number of employees who are now exempt from the overtime requirements of the FLSA will no longer qualify for exemption because they are paid less than $455 per week.
- Some employees who now qualify for the executive exemption from overtime requirements will no longer do so because they do not have sufficient hiring and firing authority.
- An employee's primary duty will be determined by the character of the job rather than by the percentage of time spent performing the primary duty.

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- It will be clear that employees who perform both exempt and nonexempt duties may be exempt where their primary duty is performance of exempt work.
- It will now be expressly stated in the regulations that first responders, licensed practical nurses, paralegals and blue-collar workers are generally not exempt and must be paid overtime compensation.
- Disciplinary suspensions of salaried employees will be less likely to threaten an employee's exempt status.
- The regulations will be easier to read and use.

The new rules will not affect:

- the way in which overtime is calculated;
- comp time;
- the 207(k) exemption for law enforcement and firefighters;
- the fluctuating workweek;
- recordkeeping requirements;
- what constitutes compensable time;
- rules for seasonal employees.

Under the old FLSA regulations, in order to be exempt from overtime requirements, employees must (1) meet defined minimum tests related to their primary job duties ("duties tests"), (2) be paid a guaranteed salary regardless of the quality or quantity of work performed (the "salary basis test"), and (3) be paid on a salary basis at or above a minimum stated amount (the "salary threshold test'). The FLSA overtime regulations have been in need of revision for some time: the old duties tests are over fifty years old, dating back to 1949, and the salary tests are thirty years old. The new regulations retain the duties tests, but eliminate the so-called "long tests" and update the short tests. They also retain the salary basis test, but set the minimum salary at a significantly higher level. Finally, the new regulations reorganize 29 C.F.R. Part 541 –the place in the Code of Federal Regulations where the regulations defining the terms of the executive, administrative and professional exemptions are found -- into a number of new subparts for easier reference.

## The Salary Basis and Salary Threshold Tests

The new regulations retain the salary basis test. That test requires that an exempt employee be paid a predetermined amount each pay period without any reductions due to the quality or quantity of the employee's work. In other words, in order for an employee to be exempt from overtime requirements, the employee must receive full salary for any week in which he or she performs *any* work — regardless of the total number of days or hours worked in that week.[4]

### Previous Salary Thresholds

To be exempt from FLSA overtime requirements, an employee must be paid a certain minimum threshold amount in weekly salary. The old salary thresholds are $155 per week ($8,060 annually) under the executive and administrative exemption long tests and $170 per week ($8,840 annually) under the professional exemption long test. The salary threshold test under each of the old short tests is $250 per week ($13,000 annually). These salary thresholds were set in 1975 and have not been revised since. Employees earning the current minimum wage of $5.15/hour and working a forty-hour week earn $10,712 per year. This means that just about every full-time employee in the nation now meets the salary threshold of the executive, administrative and professional exemption long tests, and that only those working at minimum wage or slightly above minimum wage will fail — just barely — to satisfy the short test salary threshold. It is fair to say that the old salary threshold requirements have become meaningless.

### New Salary Threshold

For all three major categories of exemption — executive, administrative and professional — the new salary threshold test will require that an employee earn a minimum of $455 per week ($23,660 annually) in order to qualify as an exempt employee.[5] Employees making less than $455 per week **cannot** qualify for an overtime exemption under any circumstances. *Any employee making less than $455 per week will have to be paid overtime for hours worked over forty, regardless of job duties.*

Because the old salary threshold tests only require employees to make a minimum of $250 per week ($13,000 annually) to qualify as exempt under

the short-version executive, administrative and professional tests, an increase to $455 will mean that a significant number of employees who were formerly classified as exempt will now be entitled to overtime — time-and-one-half — for all hours worked over forty. Changing the duties of employees who earn less than the $455 threshold amount will have no effect on their status as exempt or non-exempt under the new regulations: at a salary of less than $455 per week, they simply will not qualify. Employers may find that formerly exempt employees (who regularly worked in excess of forty hours without overtime or compensatory time) will be classified as nonexempt under the new regulations. In that situation, employers will have no recourse but to raise the employees' pay if they wish to keep those positions exempt — provided, of course, that the employees' job duties meet one of the new duties tests.

Part-time employees who make less than $455 per week will also be considered nonexempt regardless of whether their responsibilities satisfy one of the duties tests. There is no pro-rated salary threshold test for part-time employees. By definition, of course, part-time employees are unlikely to work in excess of forty hours per week. But sometimes part-time employees work additional hours during particularly busy periods. Any time a part-time employee whose salary is less than $455 per week works more than forty hours in a work week, that employee must be paid overtime.

## The Duties Tests

Assuming that an employee meets the $455 per week salary threshold, it will be the specific duties and responsibilities of the individual position — not job title or job description — that determine whether or not the employee is exempt from overtime.[6] There are different duties tests for each of the executive, administrative and professional exemptions. Under the old regulations, there are two different duties tests for each category of exemption: (a) the so-called long tests, which have a greater number of requirements, and apply to those making as little as $155 per week, and (b) the so-called short tests, which have fewer requirements and apply only to those making $250 per week or more. Because the great majority of employees satisfy the higher salary threshold, the long tests are rarely used.

The new regulations eliminate the long tests altogether (including the twenty-percent limitation on nonexempt work), just as they eliminate the two-tier salary thresholds. For employees meeting the new salary threshold of $455 per week, there is now a single duties test for each of the executive, administrative and professional exemptions. Generally, the new duties tests are slightly modified versions of the old short tests. This Bulletin assumes familiarity with the old long and short tests for each category and discusses only the requirements of the new duties tests.

### New Duties Test for Executive Employees

The new duties test for the executive exemption has three requirements. All three must be met. The employee must:

- have the primary duty of management of the organization or one of its recognized departments or subdivisions; and
- customarily and regularly direct the work of two or more employees; and
- have the authority to hire or fire other employees, or have his or her recommendations as to hiring, firing, promotion or other change of status be given particular weight.[7]

The first two requirements of the new executive test are the same two (and only) requirements of the old short test for executive employees. Only the requirement that the employee have hiring or firing authority, or substantial influence on such decisions, is new.

#### *The Primary Duty of Management*

In assessing whether an employee has a primary duty of management, the Department of Labor has now expressly rejected the notion that there is a minimum amount of time that an employee must spend performing the primary duty. New § 541.700 defines the phrase "primary duty" as meaning the "principal, main, major or most important duty that the employee performs." The regulation states that while employees who spend more than fifty percent of their time on exempt work are *likely* to be exempt, there is no minimum time *requirement*. Employees who spend less than fifty percent of their time on exempt work may still qualify for an exemption. The time spent on exempt duties may be a factor in determining the primary duty, the rule says, but the emphasis should be on "the character of the employee's job as a whole."[8]

In determining whether an employee has a primary duty of management, important factors are:

- the relative importance of the employee's management duties compared with his or her other duties;
- the amount of time spent performing management work;
- the employee's relative freedom from direct supervision; and
- the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work, if any, performed by the employee.[9]

This list does *not* represent a change of thinking on the part of the Department of Labor. As the Preamble Discussion makes clear, the list is composed of the very same factors that appear in the old regulations and in the case law interpreting them. Although the old long-test for the executive exemption contains a nonexempt work limitation of twenty percent of the employee's time, the old short test, like the new regulation, contains no time limitations. The way in which the new rule differs from the old is that now the Department of Labor places much greater emphasis on the concepts of 'the most important duty' and 'the character of the job.'

### *Directing the Work of Two or More Employees*

Like the old rule, when the new rule says that executive employees must direct the work of two or more employees, it means "two full-time employees or their equivalent."[10] Public employers whose standard workweek is fewer than 40 hours should note that the Department of Labor says that it

> stands by its current interpretation that an exempt supervisor generally must direct a total of 80 employee hours of work each week. . . . however, circumstances might justify lower standards. For example, firms in some industries have standard workweeks of 37 ½ hours or 35 hours for their full-time employees. In such cases, supervision of employees working a total of 70 or 75 hours in a workweek will constitute the equivalent of two full-time employees.[11]

Thirty-seven-and-one-half hour workweeks are fairly common in the public sector. Thus, where an employing organization has a standard full-time workweek of thirty-seven-and-one-half hours, for example, employees will satisfy the supervisory requirement of the executive test by directing the work of two or more full-time employees. But where the standard workweek is 40 hours per week and an individual employee works fewer than the standard 40 hours, supervision of that employee's work will not count as supervision of a single full-time employee.

### *Authority to Hire or Fire /Recommendation Given "Particular Weight"*

Unlike the old short test, the new test requires that the employee have actual hiring or firing authority — or at least substantial influence in hiring or firing decisions — to qualify as an exempt executive employee.[12] Employers should note that the regulations require authority to hire *or* fire, rather than authority to hire *and* fire. Thus, an employee who has authority to make new hires and promotions, but is not a decisionmaker with respect to dismissals, may still qualify as an executive employee.

What does the alternate requirement that an executive employee's recommendations about hiring, firing or promotions be given "particular weight" mean? The Department of Labor identifies three key factors: 1) whether making such recommendations is actually part of the employee's job duties; 2) the frequency with which the employee makes these recommendations and/or the frequency with which the employer requests recommendations of the employee; and 3) the frequency with which the employer adopts the employee's recommendations.[13] The mere fact than an employee makes suggestions about hirings, terminations or promotions does not in itself qualify the employee as an exempt executive. If an employee's recommendations are not solicited or are not often followed, the employee will not meet the requirements of the new executive duties test. Note that the Department of Labor also requires that the employee's recommendations relate to employees under his or her own regular supervision, rather than to co-workers or subordinates of other employees.[14]

The addition of the hiring/firing requirement to the executive test will probably result in slightly fewer employees qualifying for the executive exemption.

### *Practical Consequences of the Hiring/Firing Requirement for State Agency Employers*

Although the State Personnel Act protects most state employees from arbitrary hiring and firing decisions by providing standards and procedures for those making such decisions, neither the State Personnel Act nor any other section of the North Carolina General Statutes specifies who has hiring and firing authority within the various state agencies. Within some state agencies, for example, decisions on dismissals may be made by supervisors. If the dismissed employee does not appeal the decision, it is final. The supervisor therefore has firing authority. This is true even though the dismissed employee has a statutory right to appeal the dismissal, and the final agency decision on appeal may be made by a division head, deputy secretary or appeals committee. In agencies where the initial decision to dismiss is made by a division head or deputy secretary, supervisors will qualify as executive employees only if their recommendations carry particular weight, or if they have hiring authority independent of firing authority.

### *Practical Consequences of the Hiring/Firing Requirement for Local Government Employers*

Because the North Carolina General Statutes invest general hiring and firing authority in city and county managers, managers will continue to qualify as exempt executive employees under the new regulations, as will the sheriff and register of deeds, and the directors of county social services and health departments and area mental health authorities, all of whom have hiring and firing authority over employees in their respective departments.[15]

Assistant city and county managers, town administrators, and department and division heads, on the other hand, will no longer automatically qualify for the executive exemption since they do not have hiring and firing authority. Many, however, do have significant influence in the decisions to hire or fire employees who work either in their departments or under their supervision. In many employer organizations, it is a direct supervisor without final authority who evaluates the employee's performance or conduct and makes the initial, detailed recommendation to terminate, although the final decision may be made by a higher level manager or even a governing board. This will be particularly true in larger jurisdictions where it is difficult for a manager to have personal knowledge of an individual applicant or employee's qualifications or performance.

The requirement that an executive employee have hiring or firing authority, or at least significant influence in hiring or firing, was also a part of the proposed executive test set forth in the March 2003 proposed regulations.[16] During the public comment period, many local governments from around the country expressed concern that a significant number of public sector employees would lose the executive exemption precisely because the public sector tends to limit hiring and firing authority to the highest level of the organization. The Department of Labor took note of these concerns. In response, it makes clear in the Preamble Discussion that a supervisor's recommendation may have "particular weight" even where a higher level manager's recommendation has still more weight, and where a still-higher level manager makes the ultimate decision.[17]

Before classifying any assistant manager, town administrator, or department or division head as an exempt executive under the new regulations, local government employers must do an individualized review of that employee's role in the hiring and firing processes.

### *Use of the Highly Compensated Employee Exemption for Assistant Managers, Town Administrators and Department Heads*

The new regulations include a new provision that an employee who performs office or non-manual work and has a salary of at least $100,000 per year may be classified as an exempt employee if the employee performs any single one of the duties set forth in the executive, administrative or professional exemption tests.[18] Will this provision prove useful to local governments? Probably not.

The salaries earned by assistant managers and by heads of the various city and county departments vary widely throughout North Carolina. The Institute of Government publication *County Salaries in North Carolina 2004* reveals that in some of the state's more populous and wealthier counties, assistant managers make in excess of $100,000, as do a number of finance directors.[19] Relatively few heads of other county departments earn $100,000 or more, however. Few town administrators earn that amount.

### *Revise Job Descriptions Where Appropriate*

Both state and local government employers should review the position descriptions of those employees who meet the requirements of the executive exemption. If a job description does not reflect actual hiring or firing authority, it must be amended to include that authority. An employee's actual

duties — rather than job title or written description — are controlling in determining whether or not the employee is exempt. But should the Department of Labor investigate a complaint or conduct an audit, it will consider the job description as evidence of what an employee's actual duties are. Similarly, the job descriptions of those employees who do not have actual hiring or firing authority, but who have significant influence in such decisions, should also be changed to reflect responsibility for evaluating performance and making recommendations as to hiring, firing or promotions.

### *Employees Who Perform Both Exempt Management and Nonexempt Duties*

Many departments and divisions are headed by employees who perform both managerial and nonexempt duties. Under the new rules, employees such as these will be eligible for the executive exemption so long as their primary duty is management. So-called "working supervisors" or "working foremen" cannot be classified as exempt executives where their primary duty consists of the regular work of the department or division, not management. The new rule, entitled "Concurrent Duties," may be found at new § 541.106. It is not intended to effect a change in the law, but to state clearly — consistent with case law arising under the old regulations — the circumstances under which employees who perform both exempt management duties and nonexempt production or mission-of-the-agency work can qualify for the executive exemption.[20]

How can one distinguish between a true executive (exempt) and a working supervisor (nonexempt)? To make clear what it means by the term "working supervisor," the Department of Labor uses the example of an electrician whose primary duty is to perform electrical work, but who also directs the work of other electricians working in the same unit or at the same site, orders parts and materials for the job, and receives requests for electrical work. This electrician is nonexempt even though he carries out some management-related duties. Similarly, an otherwise nonexempt electrician who substitutes for an exempt supervisor when the supervisor is absent does not become an exempt executive by virtue of having the occasional responsibility to supervise others.[21]

In contrast, true exempt executives who also perform nonexempt tasks perform their managerial responsibilities on a regular basis. They decide when and for how long to perform managerial duties and when and for how long to perform nonexempt tasks — as opposed to having a supervisor tell them which duties to perform at what time. Generally, exempt managers can direct the work of other employees under their supervision at the same time that they perform nonexempt work. Exempt executives remain responsible for the operations and personnel under their supervision even while they perform nonexempt tasks.[22] Consistent with the definition of primary duty as it appears in new § 541.700, there is no limitation on the amount of time that an executive must spend on nonexempt tasks in order to qualify as exempt. Indeed, in *Jones v. Virginia Oil Co.*, a Fourth Circuit Court of Appeals case cited by the Department of Labor in the Preamble Discussion, the court held that an assistant manager who spent 75 to 80 percent of her time performing nonexempt work could still be classified as an exempt executive because she could perform many of her management duties at the same time that she performed the nonexempt work.[23]

In that case, Jones was the manager of a convenience store, but the court's reasoning can be instructive for government employers. Both Jones and her employer agreed that she supervised two full-time employees and that she performed both managerial and nonexempt work. The issue in the case was whether her primary duty was management when she spent so much of her time flipping burgers, working the registers, and cleaning the bathrooms and parking lot.

The court reached the conclusion that Jones was exempt after considering the factors set forth in both old § 541.103 ("Primary Duty") and new § 541.700 ("Primary Duty") (see above pages 3-4). The court found with respect to the first factor — the relative importance of the managerial tasks — Jones was responsible for hiring, scheduling, training and disciplining employees, and for checking inventory and ordering supplies, handling customer complaints, counting daily receipts and making bank deposits. These responsibilities, and Jones' own testimony that she was "in charge of everything," convinced the court that the success of the store depended on Jones' performing her managerial tasks.

As for the second factor, the amount of time spent on management, the court noted that while Jones was doing nonexempt tasks she was simultaneously supervising employees, handling customer complaints, dealing with vendors and completing daily paperwork. The court concluded that time, while important, could not be determinative in this case.

With respect to the extent of Jones' discretion, the court found that this factor also weighed in favor of finding management as her primary duty: Jones had the discretion to hire, supervise and fire employees, to handle customer complaints, and to run the day-to-day operations of the store as she saw fit. Finally, Jones earned significantly more than other employees performing the same nonexempt duties as she.[24]

The court rejected Jones' claim that she was a "working supervisor" entitled to overtime, holding that "where an individual's responsibilities extend 'to the evaluation of . . . subordinates' and include 'the exercise of considerable discretion,' the working foreman exception does not apply."[25]

How would the Fourth Circuit's analysis in *Jones* apply to a public sector position with concurrent duties? Consider the following hypothetical: the city of Paradise, North Carolina, needs to determine whether its chief code enforcement officer is an exempt executive or non-exempt position. The chief's duties include assigning the daily work of five code enforcement officers, supervising and evaluating the officers and other staff of the division, resolving disputes, preparing information in support of budget requests and administering the division's budget, and reviewing and maintaining enforcement records prepared by other officers. The demands on the code enforcement division are such that it cannot afford to have one position devoted solely to management. Thus, in addition to managing the division, the chief also goes into the field on a daily basis to conduct inspections for compliance with applicable codes and standards, to identify violations and notify property owners of the violations and necessary corrective action, and to conduct follow-up investigations.

Paradise's human resources director determines that the chief spends only forty percent of his time on management duties, and a full sixty percent of his time doing enforcement work in the field. The *Jones* case says that the actual time spent on exempt duties is not determinative of exempt status, so the human resources director considers the relative importance of the managerial tasks themselves. The position's exempt duties are much more important than its nonexempt duties: it seems fair to say that without the chief's supervision of the other officers and assignment of their work in accordance with their individual skills and expertise, and without the chief's maintenance of records and budget work, the Paradise code enforcement division could not function effectively. Were the chief not to perform the nonexempt inspection work, the division might perhaps take longer to respond to complaints and might fall behind in its inspections, but it would continue to perform its core functions.

Does the chief exercise discretion in performance of management duties? This is one of the other factors the *Jones* court considered in determining whether the store manager was a true executive or a working supervisor. The human resources director correctly concludes that the position's scheduling duties, role in hiring, evaluation and firing, preparation of budget requests, and review of enforcement records requires significant exercise of judgment. The final factor also weighs in favor of classifying the chief position as exempt. The chief makes about $8,500 more than does the highest-paid of the other code enforcement officers.

### *Can Public Safety Employees Qualify for the Executive Exemption?*

Critics of the March 2003 proposed rules claimed that police officers and firefighters would lose the right to overtime pay. In response, the Department of Labor has included a new section in the final regulations that addresses the status of public safety employees. New § 541.3(b)(1) makes clear that most public safety personnel should continue to be classified as nonexempt. It does *not* say, however, that *all* public safety personnel are *always* nonexempt employees or that public safety personnel may not qualify for the executive (or administrative) exemption. Police and fire chiefs, EMS directors and others below the rank of chief and director may qualify for the new executive exemption if they meet the three requirements of the executive job duties test.

In its attempt to clarify the status of first-responders and other public safety personnel, the Department of Labor has drafted a rule that is unfortunately long and requires careful reading. New § 541.3(b)(1) says that the executive, administrative and professional exemptions do not apply to public safety employees who perform certain types of work, no matter what the job title or the employee's rank in the department. In this, the new section is no different from any other section that deals with exemptions from overtime: what matters is the employee's actual job duties. Section § 541.3(b)(1) says that the exemptions:

> **do not apply to** police officers, detectives, deputy sheriffs, state troopers, highway patrol offices, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, **regardless of rank** or pay level, **who perform work such as preventing, controlling or extinguishing fires** of any type; **rescuing fire, crime or accident victims; preventing or detecting crimes;** conducting investigations or inspections for violations of law; performing surveillance; **pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals**, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work (emphasis added).

Another way of explaining it is to say that those public safety employees whose primary duty is to carry out the fundamental mission of the agency — preventing and fighting crime, preventing and fighting fires, performing life-saving procedures — do not qualify for the executive (or any other) exemption. Why not? Because their primary duty is not management.[26]

However, where a police, fire or emergency rescue official's primary duty is management, that person may qualify for the executive exemption, provided, of course, that the individual employee also satisfies the other requirements of the executive duties test. Courts have always found high-level police and fire officials to be exempt executives if they have satisfied the executive duties test. Indeed, in the Preamble Discussion, the Department of Labor says that the addition of new § 541.3(b) is not meant to effect a change in the law. The purpose of the new section, the Department of Labor says, is simply to codify established case law.[27]

To help government employers better understand which public safety employees may qualify for the executive exemption, the Department of Labor has given the following examples of managerial duties particular to public safety executives:

- Enforcing and imposing penalties for violations of rules and regulations;
- Coordinating and implementing training programs;
- Handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation;
- Insuring operational readiness through supervision and inspection of personnel, equipment and quarters; and
- Directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed, including whether or not the executive employee's assistance is needed at the scene.[28]

These responsibilities are in addition to the more general examples of managerial duties set forth at both old and new § 541.102 ("Management").

Thus, most police chiefs and sheriffs, fire chiefs and EMS directors will likely qualify for the executive exemption — assuming, of course, that they also direct the activities of two full-time employees or the equivalent, and that their recommendations as to hiring, firing or promotions are given particular weight. But what of police and fire and rescue captains, lieutenants, and sergeants? Persons in these positions may or may not qualify for the executive exemption depending, in part, on whether the individual's primary duty is management, or whether it is to perform the mission work of the agency.

### *Patrol Officer, Sergeant, and Lieutenant*

Analysis of three job descriptions from the police department of the imaginary city of Paradise, North Carolina, may help make this distinction clearer. Every position — whether in law enforcement, other public safety, finance public works or any other department — is a nonexempt position unless an employer can show that the responsibilities of the position satisfy either the executive, administrative or professional duties tests. Imagine, then, a patrol officer who works for the city of Paradise. The patrol officer's job duties are:

- to patrol his assigned area on foot and by car and respond promptly to calls for assistance in the patrol area;
- to investigate suspicious persons, safety hazards, dangerous situations and unusual or illegal activity in his assigned patrol area;
- to pursue and arrest those who have or are suspected of having engaged in criminal acts;

- to aid accident victims and others requiring assistance for physical injuries;
- to investigate traffic and other accidents;
- to prepare reports that document incidents; and
- to testify in court in traffic and criminal cases.

Does this patrol officer qualify for the executive exemption? No. His job duties are like those outlined in new § 541.3(b)(1). The patrol officer is what the Department of Labor calls a "production worker." He does the productive work — or agency-mission work — of his police department employer. None of his job duties involve management as it is defined by the Department of Labor in § 541.102.

Now imagine a sergeant in the Paradise police department. Her job duties are:

- to assign, coordinate and provide field supervision to seven patrol teams;
- to patrol city on foot or by vehicle and otherwise perform the job duties of a patrol officer as operational demands require;
- to respond to unusual emergency situations where on-site direction is needed;
- to train patrol officers in proper police procedures;
- to inform patrol units of changes in regulations and policies;
- to maintain shift logs and records and prepare reports;
- to log and store evidence received from patrol or investigating officers;
- to monitor and assist the shift lieutenant in evaluating the job performance of patrol officers;
- to perform the duties of shift supervisor in the absence of the shift lieutenant.

This sergeant is a front-line supervisor. But she is not an exempt executive employee. Under Jones, the sergeant is an example of a "working supervisor" or "working foreman." Although she regularly directs the work of at least two employees, her responsibility in the area of performance evaluation is fairly limited. Instead, she performs the duties of a patrol officer, while directing other patrol officers, in addition to performing additional nonexempt and a few exempt duties. There is no evidence that the police department, or the sergeant's shift, would be unable to carry out its law enforcement functions were she to fail to perform her management-related duties. Thus, her primary job duty is not management. The fact that the sergeant steps in as shift supervisor in the absence of the supervising lieutenant does not change the nonexempt status of this position. The Department of Labor has made clear that occasional performance of substitute supervisor duties does not transform what is otherwise a nonexempt position into a exempt executive position.[29]

The sergeant's supervisor is a lieutenant who has overall supervisory responsibility for the Paradise police department's day-shift. As such, the lieutenant

- develops daily and long-term operational and officer deployment plans based on crime, traffic and news reports;
- supervises all shift patrol work and all investigations;
- reviews and approves all police reports;
- evaluates performance of sergeants and patrol officers on day-shift;
- approves requests for vacation and sick leave;
- approves overtime assignments;
- evaluates equipment and supply needs and prepares day-to-day requisitions and budget requests for same;
- responds to citizen requests and complaints;
- participates in patrol functions when necessary.

The lieutenant is an excellent example of an employee with concurrent — both exempt and nonexempt — duties who nonetheless qualifies as an exempt executive. Here, in contrast to both the *Jones* case and the hypothetical of the chief code enforcement officer, the lieutenant's nonexempt duties take up a relatively small amount of the lieutenant's time, and it is clear that management duties are significantly more important. The lieutenant's management duties are critical to the effectiveness of the patrol shift.

## New Duties Test for Administrative Employees

The new rules make only small changes to the duties test for administrative employees. Under the new regulations, an employee must satisfy two conditions to qualify for the administrative exemption (in addition, of course, to the requirement that the employee earn at least $455 per week). The employee must:

- have as a primary duty the performance of office or non-manual work directly related to the management or general business operations of the employer; and
- have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance.[30]

The new duties test differs from the previous test in three ways. The new regulation (1) replaces the term "management policies" in the first requirement with the more general and broader term "management;" (2) eliminates the requirement that the employee's exercise of discretion and independent judgment occur customarily and regularly;[31] and (3) adds the requirement that discretion and independent judgment be exercised "with respect to matters of significance."[32]

Here, as in the executive and the professional duties tests, "primary duty" means the "principal, main, major or most important duty that the employee performs."[33] There is no set minimum amount of time that must be spent on administrative tasks for such work to be an employee's primary duty. The same factors applicable to executive employees — the relative importance of exempt tasks, the time spent on exempt tasks, the employees relative freedom from supervision in performing exempt tasks, and the salary relationship — should be used to evaluate whether or not an employee is an exempt administrator.[34]

### *Work Related to Management or General Business Operations*

As part of its effort to bring the regulations governing exempt employees in line with the modern workplace, the Department of Labor has updated the regulations defining what it means to perform work "related to management or general business operations." Under the new regulations, work related to general management or business operations includes work in such areas as

- finance, accounting, or auditing
- tax
- purchasing and procurement
- personnel management, human resources and employee benefits
- safety and health
- insurance and quality control
- public relations, advertising and marketing
- computer network, internet and database administration
- legal and regulatory compliance.[35]

But merely having assigned duties in the above-listed areas and a salary of $455 or more is not enough to render an employee exempt. The employee must also meet the second requirement, that he or she exercise discretion and independent judgment in matters of significance.

### *A "Production Worker" Cannot Qualify for the Administrative Exemption*

What does it mean to say that under the FLSA, an administrative employee cannot be a "production worker"? The old interpretive regulation at § 541.205(a) distinguishes exempt administrative work from so-called "production" or "sales" work. The new rule retains that exclusion. New § 541.201(a) says that to meet the requirements of the administrative exemption,

> An employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

The examples of the manufacturing production line and the retail sales staff are ill-suited to public-sector employment. But the distinction that the Department of Labor is drawing is nonetheless useful to government employers trying to understand how to apply the administrative exemption to positions that satisfy the second requirement — that is, they exercise discretion and independent judgment in matters of significance, but their primary job duties are not directly related to the management or general business operations of the employer as a whole or of a significant department or segment of the employer.

In contrasting administrative duties with production or sales work, the Department of Labor is attempting to distinguish the basic work or mission of an organization or department with the tasks needed to run the organization and allow it to do its basic work. Another way to understand this distinction is to think of production work as the mission work of the department or agency. What is the basic work, or mission, of a fire department, for example? Fire fighting and fire prevention. The mission of a public health department? To educate the public about health issues and to provide health services. Why does the register of deeds office exist? To record deeds and other important documents in the public record. Thus, a firefighter, a public health nurse who staffs a clinic, and an employee of the register of deeds who records mortgages on the land records are each engaged in the production or mission work of their respective employers. None of these positions would qualify for the administrative exemption, even if their job duties required the exercise of discretion and independent judgment in matters of significance, as the positions of firefighter, nurse and assistant register likely do.

*Other* employees of the fire department, public health department and register of deeds office, whose work *supports* the fighting of fires, provision of health services and recording of documents, may well qualify for the administrative exemption. For example, the primary duties of a fire battalion chief may not be the fighting of fires — production or mission work — but rather the administrative work that allows his unit to be scheduled, outfitted, trained and ready to fight fires. If he exercises discretion and independent judgment on matters of significance, he may be administratively exempt. So too in the case of the office manager who runs the day-to-day operation of the clinic where the public health nurse practices. The assistant register of deeds who implements the policies adopted by the elected register and oversees operations of the office may also qualify as an administrative employee even if another assistant does not.

### *The Example of the Child Protective Services Caseworker*

Social workers are among the government positions most frequently misidentified as qualifying for the administrative exemption. The very nature of the work requires most social workers to exercise discretion and independent judgment on matters of significance to individual clients. Social workers are required to document their interaction with clients and their findings and to maintain case files in accordance with accepted standards. While some may casually describe such work — or any paperwork —as "administrative," it is *not* "administrative" within the meaning of the Fair Labor Standards Act. Social workers whose primary duties take them into the field are not performing work related to the general business operations of the social services department; they are doing the work that is the mission of the agency and cannot qualify for the administrative exemption.

A closer look at one hypothetical social services position can help explain why such employees are "production workers" who do not meet the administrative duties test despite the fact that the essence of the social worker's primary job duty is the exercise of discretion and independent judgment.

Consider Pat, a social worker in the Paradise County's social services department child protective services unit. Pat has a four-year college degree, but does not have any advanced training in social work. She will not therefore qualify for the professional exemption (see below on the new professional duties test). Although she consults with other social workers in her unit on individual cases, her work does not involve directing or supervising the work of others. She does not qualify for the new executive exemption. To determine whether or not she can qualify for an administrative exemption requires a closer look at her job duties. They are to:

- assess and investigate allegations of child abuse and/or neglect;
- determine whether the immediate safety and well-being of a child who is the subject of an allegation is jeopardized, and to intervene immediately where necessary;
- assess the long-term risk to a child if he or she if left in the home;
- determine whether court action to remove the child is warranted, and bringing such action if needed;
- develop a protection and service plan with the family of the child where the child may be left in the home;
- provide counseling to the family of the child;
- monitor the family's progress toward goals in the service plan; and
- *fully and timely document in accordance with state law all stages of the investigation and subsequent action taken, including the progress of any intervention or monitoring plans.*

Pat's job duties have nothing to do with the management or general business operations of the child protective services unit. Instead, Pat helps to carry out the basic task or mission of the unit, namely, to protect children who are being abused or neglected. Although this position entails a significant amount of report-writing and filing —each step that Pat takes with respect to the investigation of a child's situation must be documented — the reporting and maintaining of the record is part and parcel of the duty to investigate allegations of child abuse or neglect and take appropriate action to protect the child. Progress cannot be monitored and court action cannot be initiated without a proper record.

Paradise County's child protective services unit is a large one and has its own accounting technician, Pat's friend Lou. In contrast to Pat's reporting and recordkeeping, Lou's has nothing to do with the actual work of protecting children. Lou's work involves monitoring the outlay of expenses against the child protective services unit's budget, processing both checks from the unit's funding sources and requests for payment from outside vendors, and arranging for purchase of equipment and supplies once they have been authorized. She also processes certain personnel-related forms, such as requests for family and medical leave. Lou's primary job duties relate to the general *business* operations of the child protective services unit; her job duties involve helping the unit have the resources to carry out its mission of protecting children.

Pat is a "production worker," to use the Department of Labor's term, and although her primary job duties involve some reporting and other paperwork," nothing that she does is directly related to the management and general business operations of the unit. Pat's social worker position does not meet either the old or the new administrative duties test. In contrast, Lou's position of accounting technician does satisfy the first requirement of the administrative duties test. Whether or not the position qualifies for the new administrative exemption will depend upon whether those duties involve the exercise of discretion and independent judgment on matters of significance.

### *Law Enforcement Officers as Production Workers*

New § 541.3(b)(1), discussed above in the section on the executive exemption, lists public safety positions and job duties that the Department of Labor wishes to make clear are not exempt. The reason that these positions are not exempt is not because the Department is privileging them, but because they have not, under the old regulations, and will not, under the new regulations, satisfy any of the duties tests.

Police officers, deputy sheriff patrol officers, highway patrol officers, crime scene officers, as well as those with detective rank, and detention and probation officers, are all good examples of so-called production workers who cannot satisfy the administrative duties test. These positions carry out the basic task or mission of law enforcement agencies, the prevention and detection of crime, and the apprehension and detention of criminals. In general, the job duties attached to these positions have little or nothing to do with the management of or business side of running the employing department.

As is the case with the new executive exemption, a law enforcement or other public safety position may have mixed management or operational (exempt) and production/mission (nonexempt) duties. When the position's *primary* duty is directly related to management or general business operations, it may qualify for the administrative exemption. For example, in many jurisdictions, lieutenants handle much of the day-to-day operation of a department or division. The job duties of a lieutenant might include supervising and coordinating the work of investigative, patrol or jail staff, including conducting shift briefs, and assigning zones and warrants, orders of arrest, subpoenas and other paperwork to be served, assisting subordinates with difficult duties or cases, planning and coordinating officer training and supervising newly hired officers throughout basic law enforcement training, investigating crimes, observing and participating in field operations, as needed, and maintaining criminal offense, crime prevention, training and/or patrol records and preparing appropriate reports.

This hypothetical list of a lieutenant's essential functions is a mix of management/operational and "production" or law-enforcement mission work. Whether or not the lieutenant satisfies the first requirement of the administrative duties test — having a primary duty directly related to management or general business operations — depends on whether the management and operational duties form the "principal, main, major or most important duty that the employee performs," or whether the lieutenant's field and investigatory work are most important.[36]

### *Discretion and Independent Judgment*

Fundamental to the concept of "discretion and independent judgment" is the question of whether the employee has options from which to make a decision or choice.[37] Drawing from previous interpretive regulations and from federal court decisions interpreting this phrase, the Department of Labor has set forth in the new regulations a non-exclusive list of factors to consider in determining whether a given employee satisfies the discretion and independent judgment requirement. Many of the factors focus on the extent of the employee's authority either to take action in the employer's name without prior approval or to take action that may deviate from established policy. The list includes whether the employee:

- formulates, interprets, or implements management policies or operating practices;
- makes or recommends decisions that have a significant impact on general business operations or finances — this includes work that relates to the operation of a particular segment or department of the organization that nonetheless affects general business operations to a significant degree;
- in involved in planning long- or short-term objectives for the organization;
- handles complaints, arbitrates disputes or resolves grievances;
- represents the organization during important contract negotiations;
- has the authority to commit the employer in matters that have significant financial impact; and
- has the authority to waive or deviate from employer policies and procedures without prior approval.[38]

In the Preamble Discussion, the Department of Labor notes that the courts have generally found enough discretion and independent judgment to satisfy the administrative duties test where employees have met two or three of the listed factors.[39] In the Preamble Discussion (which does not have the binding authority of the regulations themselves), the Department also sets forth a list of additional factors that the courts have considered in evaluating whether an employee exercises discretion and independent judgment. These factors are the employee's:

- freedom from direct supervision;
- personnel responsibilities;
- trouble-shooting or problem-solving responsibilities;
- authority to set budgets;
- degree of public contact; and
- advertising and promotion work.[40]

The new regulations emphasize that an employee may exercise discretion and independent judgment and thus qualify for the administrative exemption even if the employee's decisions or recommendations are reviewed at a higher level.[41]

### *Matters of Significance*

The Department of Labor does not define the term "matters of significance" in the new regulations, other than to say what they are not. The fact that poor job performance by an employee could have significant financial consequences for the employer does not, in and of itself, mean that the employee exercises discretion and independent judgment with respect to matters of significance.[42]

For example, the primary job duty of an employee working in accounts receivable may be processing incoming checks for deposit into the employer's account. The employee is supposed to double-check the amount of the check against the payor's account. The employee processes a check bearing the notation "paid in full," but is distracted and neglects to check the amount of the check against the account. The check is for substantially less — tens of thousands of dollars less — than the amount actually owed. Despite the fact that the mistake causes the employer to lose thousands of dollars, the employee's job duties are clerical and routine and do not involve the exercise of discretion and independent judgment in matters of significance. The potential for such an error cannot form the basis for classifying this position as administratively exempt.

### *Examples of Positions Satisfying the Administrative Duties Test*

The Department of Labor has set forth examples of positions that would satisfy both the requirement that work be directly related to management or general business operations and that the work involve discretion and independent judgment. They include:

- A human resources manager who formulates employment policies even though the decision to adopt the policies is made by others. The regulations contrast the position of human resources manager with that of a personnel clerk who collects information about job applicants and rejects those who do not meet basic qualifications, but is not involved in further evaluation of qualifying applicants.[43]
- A purchasing agent who makes major purchases, even if required to consult with top management before finalizing a major purchase. In contrast, an employee who operates an expensive piece of equipment is not performing involving the exercise of discretion and independent judgment on a matter of significance.[44]
- An executive or administrative assistant to the chief executive — e.g., the manager of a city or county — if the chief executive has delegated to the assistant the authority to arrange meetings, handle callers and answer correspondence without the need to follow specific instructions or particular procedures.[45]

The regulations also contain specific examples of government employees who will not qualify for the administrative exemption, namely, "public sector inspectors and investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees." First, the regulations explain, the work of such employees do not relate to management or general business operations. Second, their work generally involves the gathering of factual information and the application of established techniques or procedures or standards, rather than the exercise of discretion and independent judgment.[46] The new regulations also make clear that clerical or secretarial tasks, recording or tabulating data, or doing other kinds of routine work does not qualify as work requiring the exercise of discretion and independent judgment on matters of significance.[47]

### *Use of the Administrative Exemption for Assistant Managers, Town Administrators, and Department and Division Heads*

Assistant Managers and Town Administrators who do not qualify for the new executive exemption because they lack the requisite input into hiring and firing decisions will likely qualify for the new administrative exemption. Without exception, their duties relate to the management of the organization and, while their duties may vary somewhat from jurisdiction to jurisdiction, they will almost certainly meet the discretion and independent judgment and the matters of significance tests.

Department or division heads who do not qualify for the executive exemption should also qualify for the administrative exemption. As the example of the human resources manager makes clear, department heads whose substantive fields relate to the overall management of the organization will qualify as administrative employees because their work is directly related to the running of the organization as a whole. The finance director and risk manager are likely to qualify on the same basis, as is the information technology director.

Other positions whose substantive work has a significant impact on the city or county as a whole — positions such as city or county clerk, planning director, public works director, emergency management director, and economic development director — may not have a significant impact on operation of the local government unit as a whole and their eligibility for the administrative exemption is less clear. But rulings interpreting the old (and almost identical) administrative exemption have found local government department heads and division chiefs to be administratively exempt even though their work may relate to management of only a limited area of the government unit.

So, for example, in one case involving a county EMS director, the court found that her policy, budget and personnel work on behalf of the ambulance service directly related the management or general business operations of the county.[48] *Shockley v. City of Newport News*, a Fourth Circuit case, dealt with an "ethics and standards lieutenant" in a municipal police department. There, the lieutenant's primary duty was the investigation of complaints against other officers. Upon conclusion of an investigation, the lieutenant made a recommendation about disposition of the complaint to the chief of police, who usually followed her advice. The court concluded that her work was "directly related to management policies" of the city, that she exercised discretion and independent judgment, and that she therefore qualified for the administrative exemption.[49]

These and other cases show that the requirement that the work be directly related to the management or general business operations of the employer may be interpreted broadly and need not be limited to management or operational functions that effect the entire organization, so long as they effect the management or operation of an important part of the organization.

### *Administrative Exemption for Public Schools, College and Universities*

The new rules contain a new section, § 541.204, entitled "Educational Establishments." Like old §§ 541.202(c) and 541.215, the new section provides for an administrative exemption for employees of public schools, community colleges, four-year colleges and universities whose do administrative work directly related to education. New § 541.204 draws together in one place the requirements for the academic administrative exemption, defines what kind of institution qualifies for the exemption and provides examples of qualifying positions and job duties from Department of Labor Wage and Hour opinion letters.

To be exempt as an academic administrator, an employee must be paid on a salary basis and

- earn a salary of at least $455 per week, and
- have a primary duty of performing administrative functions directly related to academic instruction.[50]

This regulation allows employees who perform administrative work that is not related to management or general business operations nevertheless to qualify for an exemption. Unlike the general administrative duties test, the test for the academic administrative exemption does not require that the employee exercise discretion and independent judgment in matters of significance. Thus, the work has to be more than "office or non-manual work" and is only available to employees whose work is administrative in nature and is directly related to academic operations.

The Department of Labor has included in new § 541.204 a list of positions and primary job duties that would meet the requirements of the academic administrative exemption. Many of the positions that the Department lists may qualify under the executive, general administrative or professional exemptions, as well — a position may qualify for an exemption under more than one duties test. The Department's list includes:

- the superintendent or other head of a school system;
- assistant superintendents responsible for curriculum administration, teaching, testing of student achievement, maintaining academic standards;
- the principal or vice-principal of a public school;
- college and university department heads;
- counselors who administer tests or advise students about academic problems or degree requirements.[51]

The list is not exclusive; the regulation states that "other employees with similar responsibilities" may qualify for as exempt academic administrators.

The Preamble Discussion notes that while counselors who have responsibilities related to academic instruction (usually called guidance counselors or academic counselors) will in most cases qualify for the academic administrative exemption, college admissions counselors and college recruiters will not. The work of employees in admissions and recruitment does not generally relate to academic instruction. But the Preamble Discussion notes that such positions may well qualify for the general administrative exemption because "sales promotion work" (inappropriate as it may sound in the context of academic institutions) is considered part of an organization's "general business operations."[52]

Thus, for the same reasons, financial aid counselors and residential life counselors will not meet the academic administrative duties test. Financial aid counselors, however, if they exercise discretion and independent judgment on matters of significance, may qualify under the general administrative duties test as their functions are directly related to the general business operations of the institution. Residential life counselors, however, will not qualify under either version of the administrative exemption.

The regulation also includes a list of examples of positions that will not qualify for the academic administrative exemption: buildings and facilities maintenance workers, employees of a student health service, social workers and psychologists, and lunch room managers and dieticians.[53] Of course, such positions may qualify under other duties tests. So, for example, the head of the buildings and facilities maintenance department may qualify under the executive exemption, while registered nurses may be exempt professionals, as may social workers and psychologists. Depending on the particular duties, the lunch room manager may satisfy the executive or administrative test, or may satisfy neither and remain a nonexempt employee.

## The New Duties Test for Professional Employees

The new regulations reorganize the way in which the requirements of the professional duties test are presented, but they do not effect a substantive change. Under the new regulations, the general rule for the professional exemption is presented first. To qualify for the new professional exemption, an employee must (in addition to earning at least $455 per week) have a primary duty of performing work that requires

- knowledge of an advanced type in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction; or
- invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.[54]

The new rules then define the elements of the learned professional duties test and the creative professional duties test in separate sections, namely §§ 541.301 and 541.302 respectively. Occupations that generally meet the requirements for the creative professional exemption include actors, musicians, composers, painters, cartoonists, and novelists.[55] Because public employers rarely include such positions in their workforces, this discussion will omit those sections of the new regulations dealing with creative professionals. School, college and university employers should note that writers, artists, musicians and other creative professionals who occupy faculty positions will not qualify for the creative professionals exemption in that capacity because their primary duty will not involve creative expression, but will be instead be teaching. Such employees may qualify for an exemption under the professional teaching exemption, discussed below.

### *The Learned Professional Duties Test*

The new organization of the learned professional duties test is designed to make clear that an employee must satisfy each of three elements to qualify for the exemption. It thus expressly breaks down the regulation into separate and distinct requirements where before they seemingly ran together. The new primary duty test for the learned professional requirement has three elements. They are:

- the employee must perform work requiring advanced knowledge; and
- the advanced knowledge must be in a filed of science or learning; and
- the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.[56]

As the Preamble Discussion makes clear, the purpose of the reorganization and breakdown is to emphasize that, as is the case under the previous regulations, under the new regulations, all three elements need to be met. Critics of the March 2003 proposed rule (which differed significantly from the final rule in respect to the learned professional exemption) worried that changes to the professional duties test would open up that exemption to numerous occupations that have traditionally been nonexempt. The Department of Labor says that was not its intent. By reorganizing the rule, it hopes to show clearly that, for example,

> a journeyman electrician may acquire advanced knowledge and skills through a combination of training, formal apprenticeship, and work experience, but can never qualify as an exempt learned professional because the electrician occupation is not a "field of science or learning" as required for exemption. A licensed practical nurse may work in a "field of science or learning," but cannot meet the requirements for the professional exemption because the occupation does not require knowledge "customarily acquired by a prolonged course of specialized intellectual instruction.[57]

#### *Advanced Knowledge*

As under the old regulations, "work requiring advanced knowledge" means work that is predominantly intellectual in character. In the new regulation, it is further defined as work that "includes work requiring the consistent exercise of discretion and judgment," and contrasted with performance of routine mental, manual, mechanical or physical work. The new regulation says explicitly that high-school level instruction cannot bestow advanced knowledge.[58]

#### *Consistent Exercise of Discretion and Judgment*

Unlike the old test, the new learned professional duties test does not require an employee to exercise discretion and judgment in the performance of his or her job duties as a free-standing requirement. Instead, that concept is folded into the definition of "work requiring advanced knowledge" in new § 541.301(b). But despite being subsumed into the definition of "work requiring advanced knowledge,"

the exercise of discretion and judgment effectively remains a requirement of the professional exemption, for as the Department of Labor notes in the Preamble Discussion, a "prime characteristic" of professional work is employees' consistent application of their specialized knowledge and talents with discretion and judgment. The Department further notes that it has been unable to identify any occupation that would satisfy the learned professional duties test that does not require the consistent application of discretion and judgment.[59]

### *A Field of Science or Learning*

Consistent with interpretation of the old professional exemption, the new regulations define fields of science or learning as including the study of law, medicine, teaching, accounting, actuarial science, engineering, architecture, pharmacy, and the physical, chemical and biological sciences.[60]

The new test also restates a principle found in the old regulations: that employees who work in fields where specialized academic training is a standard requirement for entrance into the profession but who do not have the requisite degree, if they have obtained similar knowledge through a *combination* of work experience and intellectual instruction, should qualify for the professional exemption.[61] For example, a certified public accountant would qualify for the professional exemption under both the old and the new regulations. Accountants who are not CPAs but whose job duties require knowledge that is the same as that acquired by a CPA would probably qualify for the professional exemption.

## *Examples of Occupations Likely to Satisfy the New Professional Duties Test*

As is characteristic of the new rules generally, new § 541.301 sets forth examples of occupations whose typical primary duties make them likely to satisfy the new learned professional test.

### *Allied Health Professionals*

Of special interest to the state Division of Public Health, local departments of health and public hospitals is the Department of Labor's categorization of allied health professionals.

#### *Registered Nurses versus Licensed Practical Nurses*

The new regulations would continue to recognize registered nurses as learned professionals on the basis that registration by the appropriate state examining board (here the North Carolina Board of Nursing) attests to their having completed the requisite advanced study.[62] The old regulations do not address the applicability of the professional exemption to licensed practical nurses, but the Department of Labor has always classified the LPN position as nonexempt. The new rule makes the position of LPNs clear: LPNs generally do not qualify as exempt learned professionals "because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations."[63] Although LPNs must also be licensed by the state, typical LPN training is a one-year post-high school course of study, usually in a community or technical college. Registered nurses, by contrast, must have completed a minimum 2-3 year academic course of study; some will have completed a 4-5 year program.[64] In reviewing positions for eligibility for the professional exemption under the new regulations, public employers with nursing staffs should ensure that the appropriate distinction is made between registered nurses and licensed practical nurses. LPNs are nonexempt.

#### *Medical Technologists, Dental Hygienists and Physician Assistants*

The new regulations also explicitly recognize dental hygienists and physician assistants, like registered or certified medical technologists, as likely to meet the requirement for the professional exemption. To qualify, medical technologists will have to have completed three years of academic pre-professional coursework and an additional year of professional study in an appropriate medical institution; dental hygienists will have to have completed four years of pre-professional or professional coursework; physician assistants will have to have completed four years of academic pre-professional coursework in an accredited program and certification from the appropriate national credentialing body.[65]

## *Paralegals Unlikely to Satisfy the New Professional Duties Test*

As it has with the executive and administrative exemptions, the Department of Labor has also provided examples of occupations whose primary duties make them unlikely to satisfy the new learned professional test. For public employers, the most relevant example is that of the paralegal supporting the work of in-house or staff attorneys. Paralegals and legal assistants are generally not required to have an advanced, specialized academic degree to work in the field. Most come to the profession with either a four-year liberal arts degree or a two-year associate's degree in paralegal studies, or both. A paralegal who has completed a bachelor's degree,

and who then goes on to complete a two-year paralegal program is not considered to have acquired advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction, as the professional duties test requires.[66]

### *School, College and University Employees*

#### *Teachers*

The new rules maintain the professional exemption for teachers found at old § 541.314(a). New § 541.303 restates the requirements for the exemption generally and clarifies the status of coaching and advising activities closely related to elementary and secondary-school teaching. There is no substantive change in this regulation.

Under the new rules, any employee with "a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge" who is employed as a teacher in a public school, college or university will qualify for the teachers' professional exemption.[67] Neither the salary basis and salary threshold tests, nor the general requirements for the professional exemption apply to the exemption for teachers.[68]

Secondary schools and community colleges should take note that the new regulation expressly includes teachers of "skilled and semi-skilled trades and occupations" within the scope of the exemption, as well as driving instructors, home economics teachers and instructors in vocal or instrumental music. Thus, community college instructors in fields as diverse as automotive repair and culinary arts may be classified as exempt teachers. At the secondary-school level, teachers who spend a considerable amount of time overseeing student extracurricular activities will also fall within the exemption.[69]

Community and four-year colleges and universities who employ creative professionals such as artists, writers, actors and musicians as instructors will continue to be able to classify them as exempt teachers under the new rule, even where the instruction is in artistic method rather than in a more traditional academic discipline.[70]

#### *Athletic Trainers*

The new regulations identify athletic trainers who have completed four years of pre-professional and professional academic study in a specialized accredited curriculum as likely to qualify for the learned professional exemption.[71]

## Computer Employees

The new regulations make few changes to the requirements that computer workers must meet to qualify as exempt employees.[72] They continue to allow those in computer occupations — and only those in computer occupations — to be paid on *either* a salary or hourly-rate basis. The hourly rate remains unchanged at $27.63 per hour. Like all other exempt employees, however, a computer professional paid on a salary basis will have to earn a minimum of $455 per week.[73]

The primary duty test for the computer occupations exemption remains relatively unchanged under the new regulations. To qualify, an employee's work must focus on:

- the application of systems analysis, techniques and procedures to determine hardware, software or system functional specifications (this may include consulting with users);
- the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, either based on and related to user or system design specifications, or related to machine operating systems; or
- a combination of the two.[74]

The primary change in the duties test for exempt computer employees is that the employee no longer needs to exercise discretion and independent judgment to qualify.

Unchanged is the exclusion of those involved in the operation, manufacture, repair or maintenance of computer hardware and related equipment and of those whose work is dependent upon the use of computers and computer software.[75]

The computer occupations exemption continues to remain available for information technology directors, provided that their actual job duties satisfy the primary duties test, and for systems analysts and programmers. As the new regulations note, many systems analysts and computer programmers will have additional responsibilities that qualify them for the general administrative exemption, and some of the lead people in those areas will likely have management and supervisory responsibilities that qualify them for the executive exemption, as well.[76]

# Other Changes

## Full-Day Disciplinary Suspensions of Exempt Employees Would Be Allowed

The new regulations allow disciplinary suspensions of exempt employees in full-day increments. Under the old regulations, to keep an exemption intact, employers could not suspend exempt employees without pay for a period of less than one full week unless the employee violated "safety rules of major significance."[77] In a Wage and Hour Opinion Letter, DOL described a "safety rule of major significance" as one "intended to prevent serious danger to the workplace or to other employees."[78] Disciplinary suspensions of exempt employees for less than a full workweek for anything less than a major safety violation — for tardiness, for example, or insubordination or performance failures — would destroy the exemption. The old restriction did not, however, apply to nonexempt employees, putting employers in the position of having to choose between treating exempt and nonexempt employees differently for the same disciplinary infractions or foregoing a suspension of less than a week as a disciplinary action entirely.

The new regulations retain the exception for deductions made as penalties for violations of safety rules of major significance. They also add a new provision permitting deductions from the salary of exempt employees for full-day disciplinary suspensions imposed for "infractions of workplace conduct rules." The suspension must be imposed pursuant to a written policy, and the policy must be uniformly applied to all employees. The new regulations do not define the term "workplace conduct rules," but they do give as examples of permissible suspensions of exempt employees (1) a three-day suspension for violation of the employer's sexual harassment policy, and (2) a twelve-day suspension for violation of a policy prohibiting workplace violence.[79]

Employers should note that the two examples given by DOL in the new regulation involve serious misconduct with the potential for employer liability for damages suffered by other employees. The Department provides further guidance in the Preamble Discussion, saying that it does not intend the term "workplace misconduct" to be interpreted broadly and that it refers only to conduct issues and not to performance or attendance problems. In addition to sexual harassment and workplace violence, the Preamble Discussion gives violations of an employer's drug or alcohol policy or violations of law as examples of the kind of conduct that would justify a full-day suspension without pay of an exempt employee.[80]

Based on the guidance in the Preamble Discussion, it seems unlikely that the new exception covers personal misconduct that is less serious, but that may nonetheless forms the basis for disciplinary action under a personnel policy — conduct such as insubordination, excessive tardiness, or the more general category of "conduct unbecoming a government employee." The Preamble Discussion does allow for misconduct that occurs off-duty to form the basis of a full-day disciplinary suspension where the employer has a rule that covers off-site conduct of that kind.[81]

## Employers May Pay Overtime to Exempt Employees

The new regulations also make clear that employers may pay exempt employees additional compensation beyond their guaranteed minimum salary without destroying their exemptions. Such payments are typically made as a reward for additional hours worked or extra duties performed. For public employers, the additional compensation typically takes the form of

- straight-time hourly cash payment or straight-time hourly compensatory time;
- time-and-one-half hourly cash payment or time-and-one-half hourly compensatory time; or
- a flat-sum bonus payment.[82]

All such payments of additional compensation are expressly legal. Although the old regulations also permit the payment of additional compensation to exempt employees,[83] the language is less clear, and some employers have hesitated to give such compensation out of a fear that they might inadvertently destroy an exemption. The new regulations clarify this issue.

## Change in the Penalty for Docking an Exempt Employee's Pay

Under the new regulations, employers who improperly dock the pay of an exempt employee would no longer lose the exemption for all employees in the same job classification. Instead, only employers who have engaged in a "pattern and practice" of improper deductions will lose the exemption, and they will do so only for the time period during which the improper deductions were made (that is, the employer may owe employees back pay for overtime) and only for employees

working in the same job classification *and* working for the same manager who made the improper deductions.[84] At the local government level, this situation is most likely to occur in one of the county human services departments — for example, in a health department where registered nurses may be in the same job classification despite working for different managers, or in a social services department where certified social workers may fall into the same job classification despite working for different programs within the agency.

### New Rule for Correcting Improper Deductions from an Employee's Pay

Under the old regulations, an employer who accidentally makes improper deductions from an exempt employee's salary can save the exemption by reimbursing the employee for the amount of the improper deductions.[85] The new regulations retain the general terms of this so-called "window of correction," but add new requirements. Under the new regulations, an employer that makes improper deductions will not lose the exemption if it meets the following criteria:

- the employer has a written policy explicitly prohibiting the improper pay deductions identified by the DOL in its regulations;and
- the employer develops a complaint procedure for employee use in reporting improper deductions from the pay of exempt employees; and
- the employer notifies its employees of that policy and procedure through material provided at the time of hire, through an employee handbook or on the employer's intranet site; and
- the employer reimburses employees for any improper deductions that occur.[86]

If an employer willfully and repeatedly violates its own policy or continues to make improper deductions after an employee has complained of the practice, the employer loses the exemption for employees in the same job classification working for the same manager for the period that the deductions were made.[87]

## When Is the Effective Date of the New Regulations?

The new regulations have an effective date of August 23, 2004.

## Conclusion

Public employers need to review the job duties of all relevant positions and make a determination about their corresponding eligibility for exempt status under the new regulations.

**Review salary levels.** More specifically, employers should start by reviewing the salary levels of all employees currently classified as exempt. Any exempt employee who is earning less than $455 per week must be reclassified as nonexempt, or the salary must be raised to that level.

**Review job descriptions.** Next, employers should review the job descriptions of all currently exempt employees. Before considering whether or not a position's primary duties satisfy one of the duties tests, the employer should check to see that the job description is up-to-date and accurate. For job descriptions of positions with some supervisory responsibilities, consider whether or not the employee is expected to make recommendations as to hiring, firing or promotions. If so, that responsibility should be added to the job description so that there is no question that the position is satisfies the executive exemption (assuming, of course, that the other requirements are met).

Public employers should pay particular attention to those occupations singled out for comment in the new regulations by the Department of Labor: first responders, nurses and other allied health professionals, and paralegals. Although the new regulations make fairly minimal changes to the administrative and professional duties tests, their publication with new clarifications and guidances makes this a good time to review all positions.

**Draft or revise written policies.** If an employer intends now to use full-day suspensions without pay as a form of discipline for violations of workplace conduct rules, it must state its intention to do so in a written policy.

To avail itself of the new safe harbor for employers who improperly make deductions from exempt employee pay, an employer should now draft a written policy that explicitly prohibits managers and supervisors from making the improper pay deductions set forth in new § 541.602, devise a complaint procedure for the reporting of improper deductions, and circulate the new policy among its employees and provide it to new hires.

There is no grace period beyond August 23, 2004, so public employers should begin the work of bringing their organization into compliance immediately.

[1] The new regulations, entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," are published at 69 Fed. Reg. 22260 (April 23, 2004). The Fair Labor Standards Act is codified at 29 U.S.C. §§ 201-219. The FLSA exempts from both the minimum wage and overtime pay "any employee employed in a bona fide executive, administrative, or professional capacity . . ." See 29 U.S.C. § 213(a)(1). The FLSA does not define the terms "executive," "administrative" or "professional," but grants instead to the power to define and limit the terms of the exemptions to the Secretary of Labor. The specific terms of Congress' grant of rulemaking authority to the Secretary give the regulations the force of law. See 29 U.S.C. § 213(a)(1); 5 U.S.C. §§ 551-559; Batterton v. Francis, 432 U.S. 416, 455 n. 9 (1977).

[2] The draft regulations were published at 68 Fed. Reg. 15560 (March 31, 2003).

[3] The preamble may be found at 69 Fed.Reg. 22122 (April 23, 2004).

[4] See new § 541.602 at 69 Fed.Reg. 22270.

[5] See new § 541.600 at 69 Fed.Reg. 22269.

[6] See new 29 CFR § 541.2 at 69 Fed.Reg. 22260.

[7] See new § 541.100 at 69 Fed.Reg. 15585.

[8] See new § 541.700 at 69 Fed.Reg. 22272.

[9] See new § 541.700 at 69 Fed.Reg. 22272.

[10] Cf. new § 541.104 with old § 541.105.

[11] See 69 Fed.Reg. 22135.

[12] The requirement that employees have the authority to hire or fire or have significant influence in such a decision is a part of the long test for the executive exemption. See old § 541.1.

[13] See new § 541.105 at 69 Fed.Reg. 22262.

[14] See new § 541.105 at 69 Fed.Reg. 22262.

[15] See N.C. GEN. STAT. §§ 160A-148(1) and 153A-82 for city and county manager respectively. For the exclusive hiring and firing authority of the sheriff and register of deeds, see G.S. 153A-103(2), and for the hiring and firing authority of the directors of social services, health and area mental health, see G.S. 108A-14, 130A-41, and 122C-121 respectively.

[16] See proposed §541.100 at 68 Fed.Reg. 15585.

[17] See 69 Fed.Reg. 22131.

[18] See new § 541.601 at 69 Fed.Reg. 22269-22270.

[19] Available online at http://ncinfo.iog.unc.edu/pubs/electronicversions/csalindex.htm.

[20] See new § 541.106 at 69 Fed.Reg. 22262, as well as the Department of Labor's comments on concurrent duties in the Preamble Discussion at 69 Fed.Reg. 22135 – 22137.

[21] See new § 541.106(c) at 69 Fed.Reg. 22262.

[22] See new § 541.106(a) and (b) at 69 Fed.Reg. 22262.

[23] See 69 Fed.Reg. 22136 –22137; Jones v. Virginia Oil Co., 69 Fed.Appx. 633, 2003 WL 21699882 at *4 (4th Cir. 2003).

[24] Jones, 69 Fed.Appx. at 637-39, 2003 WL 21699882 at *4.

[25] Jones, 69 Fed.Appx. at 639, 2003 WL 21699882 at *5.

[26] See new §§ 541.3(b)(2) – (4) at 69 Fed.Reg. 22261.

[27] See 69 Fed.Reg. 22129.

[28] See 69 Fed.Reg. 22129 – 22130.

[29] See new § 541.106(c) at 69 Fed.Reg. 22262.

[30] See new § 541.200 at 69 Fed.Reg. 22262.

[31] The requirement that the use of discretion and independent judgment occur "customarily and regularly" only appears in the old long test, but has been incorrectly read into the short test. See old 541.2 and see the Department of Labor's comments in the Preamble Discussion to the new rules at 69 Fed.Reg. 22142.

[32] Compare new § 541.200 with old § 541.2.

[33] See new § 541.700 at 69 Fed.Reg. 22242.

[34] See new § 541.700 at 69 Fed.Reg. 22242.

[35] See new § 541.201(b) at 69 Fed.Reg. 22263, which would replace the definitions and examples found at old § 541.205.

[36] See new § 541.700 at 69 Fed.Reg. 22242.
[37] See new § 541.202(c).
[38] See new § 541.202(b) at 69 Fed.Reg. 22263.
[39] See discussion of new § 541.202(b) at 69 Fed.Reg. 22143.
[40] See 69 Fed.Reg. 22144.
[41] See new § 541.202(e) at 69 Fed.Reg. 22263.
[42] See new § 541.202(f) at 69 Fed.Reg. 22263.
[43] See new §§ 541.203(e) at 69 Fed.Reg. 22264.
[44] See new §§ 541.203(f) and 541.202(f) at 69 Fed.Reg. 22263 – 22264.
[45] See new § 541.203(d) at 69 Fed.Reg. 22264.
[46] See new § 541.203(j) at 69 Fed.Reg. 22264.
[47] See new § 541.202(e) at 69 Fed.Reg. 22263.
[48] See Mayer v. Chase County, 5 F.Supp.2d 914, 918 (D.Kansas 1998).
[49] See Shockley v. City of Newport News, 997 F.2d 18, 28 (4th Cir. 1993).
[50] See new § 541.204(a) at 69 Fed.Reg. 22264.
[51] See new § 541.204(c)(1) at 69 Fed.Reg. 22265.
[52] See 69 Fed.Reg. 22147.
[53] See new § 541.204(c)(2) at 69 Fed.Reg. 22265.
[54] See new § 541.300 at 69 Fed.Reg. 22265. A professional employee may also be one who performs work "requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." Occupations that generally meet this requirement include actors, musicians, composers, painters, cartoonists, and novelists. See new § 541.300(a)(2)(ii) at 68 Fed.Reg. 15589 and new § 541.302 at 68 Fed.Reg. 15589-15590. Because public employers rarely include such positions in their workforces, those sections of the new regulations dealing with creative professionals will not be discussed in this Bulletin.
[55] See new § 541.302(c) at 69 Fed.Reg. 22266.
[56] See new § 541.301(a) at 69 Fed.Reg. 22265.
[57] See 69 Fed.Reg. 22149.
[58] See new § 541.301(b) at 69 Fed.Reg. 22265.
[59] See 69 Fed.Reg. 222151.
[60] See new § 541.301(c) at 69 Fed.Reg. 22265.
[61] See new § 541.301(d) at 69 Fed.Reg. 22265. The new rule expressly says that the use of the word 'customarily" in "customarily acquired by a prolonged course of specialized intellectual instruction" makes the exemption available to the *occasional* professional who has come by his or her expertise in a non-traditional fashion.
[62] See new § 541.301(e)(2) at 69 Fed.Reg. 22265.
[63] new § 541.301(e)(2) at 69 Fed.Reg. 22265.
[64] See the Bureau of Labor Statistics description of the job duties and training of a licensed practical nurse at http://www.bls.gov/oco/ocos102.htm. For the educational requirements of a registered nurse, see http://www.bls.gov/oco/ocos083.htm#training.
[65] See new § 541.301(e)(1), (3) and (4) at 69 Fed.Reg. 22265-22266.
[66] See new § 541.301(e)(7) at 69 Fed.Reg. 22266.
[67] See new § 541.302(a) at 69 Fed.Reg. 22266.
[68] See new § 541.302(d) at 69 Fed.Reg. 22267.
[69] See new § 541.302(b) at 69 Fed.Reg. 22266-22267.
[70] See new § 541.302(a) and (b) at 69 Fed.Reg. 22266-22267.
[71] See new § 541.301(e)(8) at 69 Fed.Reg. 22266.
[72] The professional computer occupations exemption was added to the text of the Fair Labor Standards Act itself by Congress in 1990; thus, any changes to the test must be consistent with the terms of the exemption as provided for by Congress.
[73] See new § 541.400(b) at 69 Fed.Reg. 22267.
[74] See new § 541.400(b)(1) – (4) at 69 Fed.Reg. 22267.
[75] See new § 541.401 at 69 Fed.Reg. 22267.
[76] See new § 541.402 at 69 Fed.Reg. 22267.
[77] See old § 541.118(a)(5).

[78] See DOL Wage and Hour Opinion Letter dated March 29, 1991.
[79] See new §§ 541.602(b)(4) and (5) at 69 Fed.Reg. 22270.
[80] See 69 Fed.Reg. 22177.
[81] See 69 Fed.Reg. 22177.
[82] See new § 541.604(a) at 69 Fed.Reg. 22271.
[83] See old § 541.118(b).
[84] See new §§ 541.603(a) and (b) at 69 Fed.Reg. 22269-22270.
[85] See old § 541.118(a)(6).
[86] See new § 541.603 (c) and (d) at 69 Fed.Reg. 22271.
[87] See new §§ 541.603(b) and (c) at 69 Fed.Reg. 22270-22271.



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